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SERVICE DATE – LATE RELEASE MAY 3, 2017

SURFACE TRANSPORTATION BOARD

DECISION AND NOTICE OF INTERIM TRAIL USE OR ABANDONMENT

Docket No. AB 290 (Sub-No. 390X)

NORFOLK SOUTHERN RAILWAY COMPANY—ABANDONMENT EXEMPTION—
IN DAYTON, MONTGOMERY COUNTY, OHIO

Decided: May 3, 2017

Norfolk Southern Railway Company (NSR) filed a verified notice of exemption under 49 C.F.R. pt. 1152 subpart F—Exempt Abandonments to abandon approximately 6.5 miles of rail line: (a) between milepost ZX 12.1 and milepost ZX 15.4; and (b) between milepost ZQ 0.0 and milepost ZQ 3.2 in Dayton, Montgomery County, Ohio (the Line). Notice of the exemption was served and published in the Federal Register on April 4, 2017 (82 Fed. Reg. 16,469). The exemption is scheduled to become effective on May 4, 2017.

The Board's Office of Environmental Analysis (OEA) served an environmental assessment (EA) on April 7, 2017, recommending that one condition be imposed on any decision granting abandonment authority. In the EA, OEA noted that the City of Dayton (the City) stated that the proposed abandonment is consistent with both local and regional planning efforts. OEA stated that, in keeping with the corridor's planned future use as a recreational trail, the City requests that NSR plan to remove at-grade crossings and preserve bridge crossings over certain named streets in the area. Therefore, OEA recommended that NSR shall be required to consult with the City prior to beginning any salvage activities regarding the removal of at-grade crossings within the Line.

OEA received one comment in response to the EA by the April 24, 2017 due date. OEA issued its final EA on April 28, 2017.

In the final EA, OEA states that the Miami Tribe of Oklahoma (the Miami Tribe) offered no objection to the proposed project, but requested that, if any human remains or Native American cultural items falling under the Native American Graves Protection and Repatriation Act or archeological evidence are discovered during any phase of this project, NSR shall immediately consult with the entity of jurisdiction for the location of the discovery and notify the Miami Tribe by phone call or email. Accordingly, OEA recommends that the following new condition be imposed: in the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during salvage activities, NSR shall be required to immediately cease all work and notify OEA, the Ohio State Historic Preservation Officer (SHPO), the Miami Tribe of Oklahoma Tribal Historic Preservation Officer (THPO), and interested federally recognized tribes pursuant to 36 C.F.R. § 800.13(b). OEA shall then consult with the SHPO, NSR, the Miami Tribe of Oklahoma THPO, interested federally recognized

tribes, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.

Consistent with OEA's recommendations, the environmental condition recommended in the EA and final EA, and the new condition recommended in the final EA, will be imposed.

In the EA, OEA also stated that the right-of-way may be suitable for other public use following abandonment and salvage of the Line. On March 31, 2017, the City filed a request for the issuance of a notice of interim trail use or abandonment (NITU) to negotiate with NSR for acquisition of the 6.5-mile line for use as a trail under the National Trails System Act (Trails Act), 16 U.S.C. § 1247(d) and 49 C.F.R. § 1152.29. Pursuant to 49 C.F.R. § 1152.29, the City has also submitted a statement of willingness to assume financial responsibility for the right-of-way and has acknowledged that the use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service. In a response filed on May 1, 2017, NSR states that it is willing to negotiate with the City for interim trail use.

Because the City's request complies with the requirements of 49 C.F.R. § 1152.29 and NSR is willing to negotiate for trail use, a NITU will be issued. The parties may negotiate an agreement for the right-of-way during the 180-day period prescribed below. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. 49 C.F.R. § 1152.29(d)(2) and (h). If no agreement is reached within 180 days, NSR may fully abandon the Line. 49 C.F.R. § 1152.29(d)(1). Use of the right-of-way for trail purposes is subject to possible future reconstruction and reactivation of the right-of-way for rail service.

The City also has requested imposition of a public use condition under 49 U.S.C. § 10905 for the right-of-way. The City asks that NSR be prohibited from disposing of the corridor, other than the tracks, ties, and signal equipment, except for public use on reasonable terms, for a 180-day period from the effective date of the abandonment authorization. The City also asks that NSR be prohibited from removing or destroying potential trail-related structures such as bridges, trestles, and tunnels. The City's justification for its request is that the rail corridor has considerable value for public purposes and that the 180-day period is needed to assemble and review title information and begin negotiations with NSR.

As an alternative to interim trail use under the Trails Act, the right-of-way may be acquired for public use as a trail under 49 U.S.C. § 10905. See Rail Abans.—Use of Rights-of-Way as Trails, 2 I.C.C.2d 591, 609 (1986). Under § 10905, the Board may prohibit the disposal of rail properties that are proposed to be abandoned and are appropriate for public purposes for a period of not more than 180 days after the effective date of the decision approving or exempting the abandonment.

To justify a public use condition, a party must set forth: (i) the condition sought; (ii) the public importance of the condition; (iii) the period of time for which the condition would be

effective; and (iv) justification for the imposition of the period of time requested. 49 C.F.R. § 1152.28(a)(2). Because the City has satisfied these requirements, a 180-day public use condition will be imposed, requiring NSR to keep intact the right-of-way (including trail-related structures such as bridges, trestles, culverts, and tunnels) and to refrain from disposing of the corridor (other than tracks, ties, and signal equipment), commencing from May 4, 2017, the effective date of the exemption.

When proper requests for interim trail use/rail banking and public use conditions are made, it is the Board's policy to impose both conditions concurrently, subject to the execution of a trail use agreement. Here, however, while both conditions will be imposed at this time, the public use condition will expire on October 31, 2017, while the trail use negotiating period will run 180 days from the service date of this decision and notice, until October 30, 2017. If a trail use agreement is reached for a portion of the right-of-way prior to October 30, 2017, NSR must keep the remaining right-of-way intact for the remainder of the 180-day public use condition period to permit public use negotiations. Also, a public use condition is not imposed for the benefit of any one potential purchaser, but rather to provide an opportunity for any interested person to acquire the right-of-way that has been found suitable for public purposes, including trail use. Therefore, with respect to the public use condition, NSR is not required to deal exclusively with the City, but may engage in negotiations with other interested persons.

This decision, and the proposed abandonment if implemented as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is reopened.
2. Upon reconsideration, the notice served and published in the Federal Register on April 4, 2017, exempting the abandonment of the Line described above is modified to the extent necessary to implement interim trail use/rail banking as set forth below to permit the City to negotiate with NSR for trail use for the rail line for a period of 180 days from the service date of this decision and notice, until October 30, 2017, and to permit public use negotiations as set forth below for the rail line for a period of 180 days commencing from the effective date of the exemption, until October 31, 2017. The abandonment is also subject to the conditions that NSR shall: (1) consult with the City prior to beginning any salvage activities regarding the removal of at-grade crossings within the Line; and (2) in the event that any unanticipated archaeological sites, human remains, funerary items, or associated artifacts are discovered during salvage activities, immediately cease all work and notify OEA, the SHPO, the Miami Tribe of Oklahoma THPO, and interested federally recognized tribes pursuant to 36 C.F.R. § 800.13(b). OEA will then consult with the SHPO, NSR, the Miami Tribe of Oklahoma THPO, interested federally recognized tribes, and other consulting parties, if any, to determine whether appropriate mitigation measures are necessary.

3. Consistent with the public use and interim trail/rail banking conditions imposed in this decision and notice, NSR may discontinue service. NSR shall keep intact the right-of-way for the 6.5-mile line, including potential trail-related structures on the Line such as bridges, trestles, culverts, and tunnels, for a period of 180 days, until October 31, 2017, to enable any state or local government agency, or other interested person, to negotiate the acquisition of the right-of-way for public use. If an interim trail use/rail banking agreement is executed before expiration of the 180-day public use condition period, the public use condition will expire to the extent the trail use/rail banking agreement covers the same portion of the right-of-way.

4. If an interim trail use/rail banking agreement is reached, it must require the trail sponsor to assume, for the term of the agreement, full responsibility for: (i) managing the right-of-way; (ii) any legal liability arising out of the transfer or use of the right-of-way (unless the sponsor is immune from liability, in which case it need only indemnify the railroad against any potential liability); and (iii) the payment of any and all taxes that may be levied or assessed against the right-of-way.

5. Interim trail use/rail banking is subject to possible future reconstruction and reactivation of the right-of-way for rail service and to the trail sponsor's continuing to meet its responsibilities for the right-of-way described in paragraph 4 above.

6. If an interim trail use agreement is reached (and thus, interim trail use is established), the parties shall jointly notify the Board within 10 days that an agreement has been reached. See 49 C.F.R. § 1152.29(d)(2) and (h).

7. If interim trail use is implemented, and subsequently the trail sponsor intends to terminate trail use on all or any portion of the right-of-way covered by the interim trail use agreement, it must send the Board a copy of this decision and notice and request that it be vacated on a specified date.

8. If an agreement for interim trail use/rail banking is reached by October 30, 2017, for the right-of-way, interim trail use may be implemented. If no agreement is reached, NSR may fully abandon the Line, subject to any outstanding conditions.

9. This decision and notice is effective on its service date.

By the Board, Rachel D. Campbell, Director, Office of Proceedings.